

2011 WL 11709404 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Hawai'i.

Honolulu County

Samuel L. KEALOHA, Jr., et al,

v.

Colette Y. Pi'IPi'l MARCHADO et al.

No. 1CC1110575.

August 25, 2011.

Memorandum in Support of Motion

[Robert G. Klein](#), [Lisa W. Cataldo](#), for Colette Y. Pi'IPi'l Machado, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; S. Haunani Apoliona; Rowena Akana; Donald Cataluna; [Boyd P. Mossman](#); Oswald Stender; Peter Apo; Robert K. Lindsey, Jr.; and [John D. Waihe'e IV](#), individually and in their official capacity as Trustees of the Office of Hawaiian Affairs.

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MEMORANDUM IN SUPPORT OF MOTION**I. INTRODUCTION**

Plaintiff's Samuel L. Kealoha, Jr., Virgil E. Day, Josiah L. Hoohuli and Patrick L. Kahawaiolaa ("Plaintiffs") maintain that they are "native Hawaiians" as defined by the Hawaiian Homes Commission Act. 1920. Pub. L. No. 67-34, 42 Stat. 108 (1921) ("HHCA") and as such are beneficiaries of the trust established by the Hawai'i Admission Act,¹ by Article XII sections 4, 5 and 6 of the Hawai'i Constitution and by section 10-3(1) of the Hawai'i Revised Statutes ("HRS"). See Complaint, filed March

23, 2011 (“Complaint”) ¶¶ 1-2. Given their status as beneficiaries, Plaintiffs contend that the current OHA trustees, in their official and individual capacities, along with former OHA trustees Dante Carpenter and Walter Heen, owe or owed them a duty “clearly established by law” to expend funds received by the Office of Hawaiian Affairs (“OHA”) that are derived from the lands subject to the trust (“trust funds”) “in the sole interest of the beneficiaries.” and “for the betterment of the conditions of native Hawaiians.” See Complaint ¶¶ 10, 11, 13. Plaintiffs further contend that Defendants have violated “clearly established law” by expending trust funds, without regard to the blood quantum contained in the HHCA’s definition of “native Hawaiian,” on (1) lobbying efforts to support passage of the “Akaka Bill”; (2) support of the Native Hawaiian Legal Corporation (“NHLC”); (3) support of the Na Pua No’eau Education Program (“Na Pua No’eau”); and (5) support of Alu Like, Inc. (“Alu Like”). See *id.*, ¶ 11. Plaintiffs seek an accounting and restoration of funds for this alleged misappropriation of trust funds, *id.* ¶ 14, injunctive relief, *id.* ¶ 15, and damages for breach of trust under [HRS section 10-16\(c\)](#) and State common law. *Id.* ¶ 17,

All of Plaintiffs’ claims fail because they are precluded by the opinions and judgment in Plaintiffs’ recently-concluded action against the OHA trustees in federal court. See *Day v. Apoliona*, 616 F.3d 918 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1501 (2011). There, in addition to the State law claim asserted here, Plaintiffs asserted claims under 42 U.S.C. § 1983 and the Equal Protection Clause, based on the very same expenditures Plaintiffs challenge here. Although it declined to exercise pendent jurisdiction over the State law claim, the United States District Court for the District of Hawai’i held that the challenged expenditures were proper exercises of the OHA trustees’ broad discretion under *federal* law, as each expenditure addressed at least one of the trust purposes under section 5(f) of the Admission Act. The United States Court of Appeals for the Ninth Circuit affirmed on this ground. Consequently, to the extent Plaintiffs allege a breach of the trust under section 5(f) of the Admission Act, the claim is barred by *res judicata*.

Moreover, as Plaintiffs allege That State law restricts OHA’s use of trust funds to a single 5(f) purpose--the betterment of the conditions of native Hawaiians--the claim is barred by collateral estoppel. In conducting their analysis under federal law, both the district court and the Ninth Circuit concluded that each of the challenged expenditures was a reasonable exercise of the OHA trustees’ discretion in expending funds to further the specific section 5(f) purpose of the betterment of conditions of native Hawaiians. They held this to be true even if such expenditures also benefitted Hawaiians. The resolution of these issues is binding in this case by application of collateral estoppel.

To the extent Plaintiffs seek damages against the OHA trustees in their individual capacities for violations of rights secured by the State Constitution and statutes, the claims fail because, first, there is no State counterpart to 42 U.S.C. § 1983 and, even if there were, the claim would be precluded by the OHA trustees’ qualified immunity. As held by the district court in *Day v. Apoliona*, because the trustees’ expenditures of funds did not constitute a violation of clearly established law, they were also entitled to qualified immunity.

Finally, even if *res judicata* and collateral estoppel were not applicable here, Plaintiffs’ claims would fail for the independent reason that the analysis of the district court and the Ninth Circuit is correct and fully applicable here. For all these reasons, the OHA trustees are entitled to dismissal of all the claims asserted in the Complaint.

II. FACTUAL BACKGROUND

A. Trust Lands Under The Admission Act

Plaintiffs’ claims for damages and injunctive relief against the OHA trustees rely upon the provisions of sections 4 and 5(f) of the Admission Act relating to lands conveyed to the State of Hawai’i by the United States as a “public trust” at the time of statehood in 1959. Specifically, section 5(f) of the Admission Act states:

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together

with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for *the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.*

Emphasis added.

The “public trust” provisions set forth in the Admission Act were not, however, self-executing and expressly contemplated further action on the part of the State to enact appropriate constitutional mandates and statutory requirements. *See OHA v. Yamasaki*, 69 Haw, 154, 161, 737 P.2d 446, 450 (1987). As established by the 1978 Constitutional Convention, Article XII, section 5 of the Hawai'i Constitution establishes OHA and provides in pertinent part: “[t]he Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held *in trust for native Hawaiians and Hawaiians.*” (Emphasis added). Similarly, Article XII, section 6 of the Hawai'i Constitution provides:

The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians... and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians.”²

HRS section 10-3 provides that the purposes of OHA include:

- (1) The betterment of conditions of native Hawaiians, A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians...;
- (2) The betterment of conditions of Hawaiians;
- (3) Serving as the principle public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians ...

The powers and duties of its trustees set forth in HRS chapter 10 likewise reinforce that the OHA trustees are bound to uphold the constitutional and statutory mandates to “manage, invest and administer the proceeds from the sale or other disposition of lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred in [section 10-3](#).” HRS § 10-5(1). [HRS section 10-4](#) confers upon the trustees broad discretion in carrying out the duties of the office:

There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers:

...

(2) To acquire in any lawful manner any property, real, personal or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed and paid, subject to the provisions of law specifically applicable to the office of Hawaiian affairs;

...

(9) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

B. The Claims Asserted in *Day v. Apoliona*

On March 10, 2006, Virgil Day, Mel Hoomanawanui, Josiah L. Hoohuli, Patrick Kahawaiolaa and Samuel L. Kealoha, all of whom, with the exception of Mel Hoomanawanui, are Plaintiffs herein, filed a First Amended Complaint in the United States District Court for the District of Hawai'i alleging that they are "native Hawaiians," as defined in the HHCA and as such are "special beneficiaries of a compact and trust imposed by §§ 4 and 5(f)" of the Admission Act. *See* Exhibit "A" (First Amended Complaint, filed March 10, 2006) ¶ 1. As in the instant case, given their status as beneficiaries, they contended that the defendants therein, current and former OHA trustees, almost all of whom are defendants in the current action, owe or owed them a duty "clearly established by law" to expend trust funds transferred to OHA from the State of Hawai'i that are "derived directly or indirectly from the lands subject to the trust established by § 5(f) of the Admission Act" solely for the betterment of the conditions of native Hawaiians. *See id.* ¶¶ 8, 9. Plaintiffs further contended, as they do here, that the OHA trustees violated "clearly established law" by expending trust funds without regard to the blood quantum contained in the HHCA's definition of "native Hawaiian" on lobbying efforts to support Akaka Bill, and in support of the NHLC, Na Pua No'eau and Alu Like. *See id.* ¶ 11. Similarly, Plaintiffs sought damages, an accounting and restoration of funds against the OHA trustees in their individual capacities for the alleged misappropriations of trust funds, as well as related injunctive relief. *See id.* 10-11. Plaintiffs challenged the expenditures as a violation of the Admission Act section 5(f), enforceable under 42 U.S.C. § 1983; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and Hawai'i common law and HRS section 1016(c). *See id.* and *Day v. Apoliona*, 451 F. Supp. 2d 1133, 1146 (D. Haw. 2006).

C. The Procedural History of and Decisions in *Day v. Apoliona*

Initially, the district court dismissed the complaint, holding that public trust duties under the Admission Act could not be enforced under 42 U.S.C. § 1983. The court also dismissed the Equal Protection claim and declined to exercise supplemental jurisdiction over the State law claim, dismissing it as well. *Day*, 451 F. Supp. 2d at 1136. Plaintiffs did not appeal the dismissal of the Equal Protection claim or the discretionary dismissal of the State law claim, but appealed only the court's ruling that they failed to allege any violation of Admission Act section 5(f) enforceable under § 1983. *See Day v. Apoliona*, 496 F.3d 1027, 1030 (9th Cir. 2007). On appeal, the Ninth Circuit reversed and remanded, holding that native Hawaiian plaintiffs, as beneficiaries of the trust created by section 5(f), "have an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right." *Id.* at 1039. The Ninth Circuit left it "to the district court... to determine in the first instance not only whether [plaintiffs'] allegations are true, but also whether the described expenditures in fact violate § 5(f)." *Id.*

1. The District Court's Summary Judgment on Remand

On remand, the district court entered summary judgment in the OHA trustees' favor on the § 1983 claim. It framed the issue as "whether section 5(f) of the Admission Act permits the use of the public trust funds for purposes other than to benefit only native Hawaiians, e.g., to support the Akaka Bill, [NHLC, Na Pua No'eau], and Alu Like." *Day v. Apoliona*, 2008 U.S. Dist.

LEXIS 48211. * 17-18 (D. Haw. June 20, 2008) (attached as Exhibit “B”). It noted that there were no material factual disputes, and it was “undisputed that OHA is using public trust funds” to support the Akaka Bill, NHLHC, Na Pua No'eau and Alu Like, “none of which reserves its benefits for only native Hawaiians.” *Id.* at *17. Analyzing each category of expenditure, it held that “[b]ecause these expenditures of trust funds are consistent with the Admission Act, Defendants are entitled to summary judgment on Plaintiffs' § 1983 claims.” *Id.* at * 18.

a. The Akaka Bill

The District Court began its analysis of the four challenged expenditures with an examination of the Akaka Bill, which “seeks to provide for a process through which the United States will recognize a Hawaiian governing entity. The Akaka Bill provides that it does not affect the definition of ‘Native Hawaiian’ under any other federal or state law.” *Day*, 2008 U.S. Dist. LEXIS 48211, at *23 (citing Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007) generally and at §3, ¶ 10(B)).³ The court observed that the OHA trustees are charged with administering the public trust and, under the terms of the Admission Act, are allowed to use trust funds for the betterment of the conditions of native Hawaiians. *Id.* at *21. “Because the Admission Act is silent as to exactly how the funds must be used to better the conditions of native Hawaiians, the OHA trustees have broad discretion in making that determination,” and, “[w]hen a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent **abuse** of discretion.” *Id.* (quoting *Restatement (Second) of Trusts* § 87 (2007) (hereinafter, “*Restatement*”).

The court held that “the OHA trustees may exercise reasonable fiduciary judgment in expending trust funds in support of the Akaka Bill. Even if the Akaka Bill is intended to benefit Hawaiians in general, the OHA trustees would not be unreasonable or arbitrary in viewing the Akaka Bill as also benefitting native Hawaiians.” *Day*, 2008 U.S. Dist. LEXIS 48211, at *24. The court noted that “[n]umerous legal challenges have been brought against Hawaiian-only and native Hawaiian-only programs,” often asserting Equal Protection violations, and passage of the Akaka Bill “might ultimately affect whether programs benefitting only Hawaiians and native Hawaiians are reviewed under the ‘strict scrutiny’ standard as involving racial preferences, or under a ‘rational basis’ standard as involving a political preference.” *Id.* “It cannot be said that the OHA trustees are **abusing** their discretion in supporting legislation that could affect challenges to programs favoring Hawaiians and native Hawaiians.” *Id.* at *24-25. The court held the OHA trustees “are reasonably exercising their fiduciary judgment when they expend trust funds in support of the Akaka Bill. That action is consistent with the public trust requirement that trust funds be used for the betterment of the conditions of native Hawaiians, even if the funds simultaneously better the conditions of Hawaiians.” *Id.* at *25.

Addressing the distinction Plaintiffs again make here, the court held that “[n]othing in section 5(f) of the Admission Act prohibits the use of trust funds that, while bettering the condition of native Hawaiians, also benefits the conditions of others. Plaintiffs read section 5(f) in a cramped, exclusionary manner that, if accepted, could lead to ridiculous results,” *Day*, 2008 U.S. Dist. LEXIS 48211, at *25. The court provided a number of hypothetical illustrations, including one in which a particular disease disproportionately affects native Hawaiians and OHA, in an attempt to address an epidemic affecting a large percentage of native Hawaiians, initiates a study or contributes to a pre-existing research program concerning the disease. *Id.* The court asked: “Would OHA be barred under Plaintiffs' reasoning from supporting such research simply because its benefits would not flow exclusively to native Hawaiians?” *id.*; and suggested it would not.

The court also illustrated the infirmity of Plaintiffs' argument through their position at the hearing on the motion, in which they “praised OHA's recent use of the public trust to support the Department of Hawaiian Home Lands' provision of housing to native Hawaiians.” *Day*, 2008 U.S. Dist. LEXIS 48211, at *27. The court noted, however, that the Department does not restrict who can live in a Hawaiian Home Lands house and, when it grants a house to an eligible native Hawaiian, the native Hawaiian might live in the house with a non-Hawaiian spouse and Hawaiian children, *Id.* at *27-28. “If Plaintiffs accept this situation as consistent with section 5(f), the court wonders why they challenge other expenditures that benefit not only native Hawaiians but Hawaiians as well.” *Id.* at *28.

The court cited the Restatement for the proposition that courts “will not interfere with a trustee's exercise of a discretionary power ... when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties.” *Day*, 2008 U.S. Dist. LEXIS 48211, at *28 (quoting *Restatement* § 87, cmt. b. (2007)). It concluded, “[n]othing in the record indicates that the OHA trustees are supporting the Akaka Bill in bad faith or based on an otherwise improper motive.” *Id.*

b. Native Hawaiian Legal Corporation

As to the OHA trustees' use of trust funds to support NHLC, the court noted that OHA's contract with NHLC requires NHLC to “render legal services and provide legal representation to clients in substantive areas which shall include but shall not be limited to”;

- (a) Assertion and defense of quiet title actions;
- (b) Protection, defense and assertion of ahupua'a and kuleana tenant rights, including rights of access and rights to water;
- (c) Land title assistance, including review of title and genealogy;
- (d) Preservation and perpetuation of traditional and customary practices;
- (e) Protection of culturally significant places, including burial sites and material culture; and
- (f) Preservation of Native Hawaiian Land Trust entitlements.

Day, 2008 U.S. Dist. LEXIS 4821], at *32. The court held that “the provision of legal services arguably better the conditions of native Hawaiians because it helps to preserve and perpetuate their traditional and customary practices, protect[s] culturally significant areas, and help[s] them assert their legal rights regarding land and water in court.” *Id.* at *34. “Nothing in the record establishes that the OHA trustees failed to use reasonable judgment in interpreting the Admission Act as allowing OHA to support this program to benefit native Hawaiians, while simultaneously benefitting Hawaiians in general.” *Id.* at *34-35. “As Plaintiffs do not establish that the OHA trustees **abused** their discretion in this regard, Plaintiffs cannot prevail on this point.” *Id.* at *35,

c. Na Pua No'eau Education Program

As to the OHA trustees' distribution of trust funds to the University of Hawai'i at Hilo, for Na Pua No'eau, the court recited that the purpose of the program was to provide for educational enrichment programs for Hawaiian children in grades K through 12 throughout the State and “to develop a stronger interest in learning, connect learning and education to one's Hawaiian identity, and explore possible educational, career and academic goals.” *Day*, 2008 U.S. Dist. LEXIS 48211, at *35-36.

The court noted that the use of trust funds for the program was consistent with the Admission Act, which allows the trust to be used for the support of public schools and other public educational institutions. *Day*, 2008 U.S. Dist. LEXIS 48211, at *36. It further held, however, that the use of trust funds to support Na Pua No'eau “also arguably better the conditions of native Hawaiians in ensuring that learning is connected to students' Hawaiian identity. Native Hawaiians stand to benefit if Hawaiian identity in general is preserved and pride in Hawaiian identity fostered.” *Id.* at *37. The court held the OHA trustees were “authorized to exercise their fiduciary judgment in determining the details of how to better the conditions of native Hawaiians through the use of trust funds,” and “[n]othing in the record establishes that the OHA trustees failed to use reasonable judgment in interpreting the Admission Act as allowing OHA's support of this program, which, while benefitting native Hawaiians, also benefits Hawaiians in general.” *Id.*

d. *Alu Like, Inc.*

The court also held the OHA trustees were entitled to dismissal of Plaintiffs' claim as to the OHA trustees' support of Alu Like, "a nonprofit organization that strives to help Hawaiians and native Hawaiians achieve social and economic self-sufficiency through the provision of early childhood education and child care, **elderly** services, employment preparation and training, library and genealogy services, specialized services for at-risk youth, and information and referral services." *Day*, 2008 U.S. Dist. LEXIS 48211, at *38. "In supporting Alu Like, the OHA trustees have exercised their reasonable discretion and fiduciary judgment. Alu Like's programs better the conditions of native Hawaiians and support public education, the first and second purposes listed in section 5(f) of the Admission Act," *Id.* The court further held that the OHA trustees "did not **abuse** their considerable discretion in determining that one of the ways they were going to better the conditions of native Hawaiians was by providing support to a service organization with the mission of helping Hawaiians and native Hawaiians achieve social and economic self-sufficiency." *Id.* at *39.

Additionally, the district court found that the OHA trustees were "simultaneously and redundantly" entitled to qualified immunity because plaintiffs failed to establish any violation of federal law, *Day*, 2008 U.S. Dist. LEXIS 48211, at *20.

2. *The Ninth Circuit Opinion on Appeal*

On appeal, the Ninth Circuit affirmed. *Day v. Apoliona*, 616 F.3d 918, 927 (9th Cir. 2010) (attached hereto as Exhibit "C") ("[W]e affirm the district court's grant of summary judgment to the OHA trustees. The district court ably analyzed and rejected plaintiffs' argument that the challenged expenditures are outside the bounds of a reasonable judgment of a trustee acting to pursue § 5(f)'s purposes."). The Ninth Circuit noted that the district court held that each of the challenged expenditures was consistent with at least one of the five trust purposes enumerated in section 5(f), and "implicitly concluded that the OHA trustees may, as a matter of federal law, spend § 5(f) money for any of the five enumerated purposes," rejecting plaintiffs' argument that "federal law requires the OHA trustees to spend the portion of the § 5(f) trust they administer only for one particular § 5(f) purpose, namely the betterment of the conditions of native Hawaiians." *Id.* at 923. The Ninth Circuit held that, although section 5(f) "permits Hawaii to impose further rules and restrictions on management of the § 5(f) trust, it does not require the state and its agents to abide by those rules and restrictions as a matter of federal law. Those alleged violations are actionable under state law, if at all." *Id.* at 929. Nonetheless, in reviewing the district court's analysis, the Ninth Circuit concurred in the court's holding that each of the expenditures was a reasonable exercise of discretion in serving the trust purpose of improving the conditions of native Hawaiians.

a. *The Akaka Dill*

The Ninth Circuit held that the trustees "had discretion to use § 5(f) funds to lobby for enactment of the Akaka Bill." *Day*, 616 F.3d at 927. "Although it is possible that the processes the Akaka Bill envisions could dilute some benefits that native Hawaiians currently enjoy to the exclusion of other Hawaiians, a trustee could reasonably conclude that the bill's benefits to the conditions of native Hawaiians outweigh any drawback and therefore choose to use trust proceeds to support it." *Id.* Citing the district court's opinion, the court held, "[e]ven if the Akaka Bill is intended to benefit Hawaiians in general, the OHA trustees would not be unreasonable or arbitrary in viewing the Akaka Bill as also benefitting native Hawaiians." *Id.*

b. *Native Hawaiian Legal Corporation*

The Ninth Circuit similarly held the trustees "had discretion to use § 5(f) funds for the NHLC contract." *Day*, 616 F.3d at 927. "Among the 'substantive areas' in which the contract requires NHLC to provide legal representation to Hawaiians is the '[p]reservation and perpetuation of traditional and customary practices [and] [p]rotection of culturally significant places,

including burial sites and material culture,' ” *Id.* at 927-28. “Under a general standard of reasonableness, it was within the trustees' broad discretion to determine that expanding the provision of legal services of this kind will ‘better[] ... the conditions of native Hawaiians.’ ” *Id.* at 928 (quoting Admission Act § 5(f)).

c. *Na Pua No'eau*

As to Na Pua No'eau, the court held it was “reasonable for the trustees to fund the Na Pua contract.” *Day*, 616 F.3d at 928, “The record shows that OHA gave Na Pua § 5(f) money to provide educational services to Hawaiians that would ‘connect [their] learning and education to [their] Hawaiian identity.’ ” *Id.* “A reasonable trustee could view this contract as serving at least two of the § 5(f) purposes -- ‘support[ing]... public schools and other public educational institutions’ and ‘betterment of the conditions of native Hawaiians.’ ” *Id.* The court held that a trustee could reasonably believe that native Hawaiians will benefit from additional funding for education directed to Hawaiian culture and identity,” *Id.* “As the district court found, ‘[n]ative Hawaiians stand to benefit if Hawaiian identity in general is preserved and pride in Hawaiian identity fostered.’ ” *Id.*

d. *Alu Like, Inc.*

The Ninth Circuit also held the OHA trustees “had discretion to fund the Alu Like contract.” *Day*, 616 F.3d at 928. “That contract obligates Alu Like to provide ‘a comprehensive system for beneficiaries [including native Hawaiians and Hawaiians] to receive information, referrals,... case management, personal financial management, and emergency fund assistance’ consistent with a proposal that Alu Like submitted to OHA.” *Id.* “As the district court found, the trustees could have reasonably determined that the conditions of native Hawaiians would benefit from Alu Like's efforts to ‘help[] Hawaiians and native Hawaiians achieve social and economic self-sufficiency.’ ” *Id.*

The court therefore concluded that there was no triable issue as to whether the OHA trustees had discretion to use section 5(f) funds for the challenged expenditures, as each was within the trustees' broad discretion to serve the trust purposes. Plaintiffs thus failed to establish a violation of any federal statutory right. *Day*, 616 F.3d at 928. On February 22, 2011, the United States Supreme Court denied Plaintiffs' petition for writ of certiorari, 131 S. Ct. 1501 (2011) (attached hereto as Exhibit “D”).

III. APPLICABLE STANDARDS

A. Dismissal Under Rule 12(b)(6)

Rule 12(b)(6) of the Hawai'i Rules of Civil Procedure (“HRCP”) provides that dismissal of a claim is appropriate where the complaint fails to state a claim upon which relief can be granted. A dismissal for failure to state a claim is proper if the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Midkiff v. Castle & Cooke, Inc.*, 45 Haw. 409, 414, 368 P.2d 887, 890 (1962). In reviewing a motion to dismiss, the court deems all allegations in the complaint as true. *See Au v. Au*, 63 Haw. 210, 214, 626 P.2d 173, 177(1981). However, when weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept a plaintiff's conclusory allegations about the legal effect of the events alleged. *Marsland v. Pang*, 5 Haw, App. 463, 474, 701 P.2d 175, 186(1985).

B. Consideration of Materials Outside the Complaint

Generally, if the court decides to accept “matters outside the pleadings,” the motion may be treated as one for summary judgment and disposed of as provided in HRCP Rule 56. *See* HRCP Rule 12(b)(6); *Tataii v. Cronin*, 119 Hawai'i 337, 340, 198 P.3d 124, 127 (2008); 2-12 *Moore's Federal Practice - Civil* § 12.34 (2011).⁴ Significantly, however, courts may “consider certain materials--documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice--without converting the motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d

903, 908 (9th Cir. 2003); *see also Ellis v. Crockett*, 51 Haw. 45, 55, 451 P.2d 814, 821 (1969) (“We hold that where collateral estoppel appears from the face of the complaint or from the taking of judicial notice or prior interrelated proceedings which are alluded to in the complaint, such defense may be raised by a motion to dismiss under... Rule 12(b)(6).”). “[A]mple authority exists which recognizes that matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue, may be looked to when ruling on a 12(b)(6) motion to dismiss.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach (In re Am. Cont'l Corp./Lincoln S&L Sec. Litig.)*, 102 F.3d 1524, 1537 (9th Cir. 1996) (string citing supporting cases), *rev'd on other grounds*, 523 U.S. 26 (1998).

IV. REQUEST FOR JUDICIAL NOTICE

The OHA trustees request that the Court take judicial notice of the First Amended Complaint in *Day v. OHA* (Exhibit “A”), the Judgment in that case (Exhibit “E”) the opinions of the district court and Ninth Circuit in that case (Exhibits “B” and “C”, respectively), and the United States Supreme Court's denial of writ of certiorari (Exhibit “D”). Under Rule 201 of the Hawai'i Rules of Evidence, judicial notice may be taken of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Rule 201 also provides that a court may take judicial notice at any stage of the proceeding. Where, as here, a document is a matter of public record and its significance bears on the instant matter, it is appropriate for judicial notice. *See Kaho'ohanohano v. State*, 114 Hawaii 302, 328, 162 P.3d 696, 722 (2007); *Onaka v. Onaka*, 112 Hawaii 374, 386, 146 P.3d 89, 101 (2006) (“It is settled law that a court ‘may take judicial notice of the record in a related case.’ ”)

Judicial notice is also appropriate when the defense of collateral estoppel or res judicata is raised, and does not convert a motion to dismiss to one for summary judgment. *See Ellis*, 51 Haw. at 55, 451 P.2d at 821 (holding that “where collateral estoppel appears ... from the taking of judicial notice or prior interrelated proceedings which are alluded to in the complaint, such defense may be raised by a motion to dismiss”); *Shaw v. Hahn*, 56 F.3d 1128, 1129 n. 1 (9th Cir. 1995) (taking judicial notice of an order in another case to determine applicability of collateral estoppel); *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (district court's consideration of state administrative records to determine whether an agency decision had collateral estoppel effect on plaintiff's claim did not convert 12(b)(6) motion to one for summary judgment).

V. ARGUMENT

A. Plaintiffs' Claim For Breach of Trust under Section 5(f) of the Admission Act is Barred by Res Judicata.

Plaintiffs' claim of a breach of trust and misappropriation of funds from the trust established by sections 4 and 5(f) of the Admission Act is barred by res judicata, based upon the judgment in *Day v. Apoliona*, 2008 U.S. Dist. LEXIS 48211, * 17-18 (D. Haw. June 20, 2008), *aff'd* 616 F.3d 918, 927 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1501 (2011), and the analysis in the affirming opinions of the district court and the Ninth Circuit. The federal courts have already conclusively determined that the expenditures at issue here do not constitute a breach of the trust established by the Admission Act, and that determination bars the claim here,

Res judicata, or claim preclusion, “is a doctrine ‘that limit[s] a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy.’ ” *Tortorello v. Tortorello*, 113 Hawaii 432, 439, 153 P.3d 1117, 1124 (2007) (quoting *Bremer v. Weeks*, 104 Hawaii 43, 53, 85 P.3d 150, 160 (2004)). Res judicata “prohibits a party from relitigating a previously adjudicated cause of action.” *Id.* (quoting *Bremer*, 104 Hawaii at 53, 85 P.3d at 160). The judgment of a court of competent jurisdiction “is a bar to anew action in any court between the same parties or their privies concerning the same subject matter.” and “precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.” *Id.* (quoting *Bremer*, 104 Hawaii at 53-54, 85 P.3d at 160-61).

The Hawai'i Supreme Court has held that the "policy reasons underlying both res judicata and collateral estoppel are several." [Ellis](#), 51 Haw. at 56, 451 P.2d at 822. Although every litigant must have an opportunity to try his case on the merits, public policy "also requires that he be limited to one such opportunity." *Id.* "Furthermore, public reliance upon judicial pronouncements requires that what has been finally determined by competent tribunals shall be accepted as undeniable legal truth. Its legal efficacy is not to be undermined." *Id.* These doctrines also "tend 'to eliminate vexation and expense to the parties, wasted use of judicial machinery and the possibility of inconsistent results.'" *Id.* (citation omitted).

The party asserting claim preclusion "has the burden of establishing that (1) there was a final judgment on the merits. (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question. *Id.* (quoting [Bremer](#), 104 Hawaii at 54, 85 P.3d at 161); see also [Omerod v. Heirs of Kainoa Kupuna Kaheananui](#), 116 Hawai'i 239, 264, 172 P.3d 983, 1008 (2007) (same).

1. There was a Final Judgment on the Merits in Day v. Apoliona.

On June 20, 2008, pursuant to the district court's decision and order set out in *Day v. Apoliona*, 2008 U.S. Dist. LEXIS 48211, *17-18 (D. Haw. June 20, 2008), final judgment was entered against Plaintiffs and in favor of the OHA trustees. See Exhibit "E". As evidenced by the district court's opinion, the decision was on the merits.

2. The Parties Here are the Same as in Day v. Apoliona.

The parties in the instant case are the same as in the previous action. All four Plaintiffs in this case--Samuel L. Keoloha, Jr., Virgil E. Day, Josiah L. Hoohuli and Patrick L. Kahawaiolaa--were Plaintiffs in *Day v. Apoliona*, See Exhibit "A."

The defendants in *Day v. Apoliona* were current and some former trustees in their official and individual capacities, just as in the instant case.

3. The Breach of 5(f) Trust Claim Decided in Day v. Apoliona is Identical to the Claim Presented Here.

To the extent Plaintiffs allege that the expenditures of funds for the Akaka Bill, NHLHC, Na Pua No'eau and Alu Like constitute breaches of trust duties established by section 5(f) of the Admission Act, the claim is identical to that asserted in *Day v. Apoliona*, and is therefore precluded by res judicata. In *Day v. Apoliona*, Plaintiffs alleged in pertinent part:

8. From on or about June 4, 1993 until the present time, Defendants, and their predecessors in office, have received funds, hereinafter referred to as "trust funds." derived directly or indirectly from the lands subject to the trust established by §5(f) of the Admission Act.

9. By virtue of their positions as Trustees of the Office of Hawaiian Affairs and recipients of trust funds, Defendants owe or owed a duty, clearly established by law, to Plaintiffs, and all other "native Hawaiian" beneficiaries, to expend said funds solely for the uses and purposes set forth in § 5(f) of the Admission Act.

10. By clearly established law, said trust funds must be expended by Defendants solely for the betterment of the conditions of "native Hawaiians."

11. In violation of clearly established law. Defendants have expended trust funds without regard to the blood quantum contained in the definition of native Hawaiians in HHCA

See Exhibit "A." The complaint then listed as improper expenditures those to support passage of the Akaka Bill and to support NHLHC, Na Pua No'eau and Alu Like. *Id.*

The allegations in the *Day v. Apoliona* complaint are virtually identical to the allegations herein, *see* Complaint ¶¶ 9-11, with the exception that here, Plaintiffs allege that the trust at issue was established not only by sections 4 and 5(0 of the Admission Act, but also [HRS section 10-3\(1\)](#) and Article XII, sections 4, 5 and 6 of the Hawai'i Constitution. Consequently, to the extent Plaintiffs assert a claim for breach of the trust under section 5(f) of the Admission Act. the claim is barred by res judicata, as *Day v. Apoliona* conclusively established that the expenditures complained of in that case, and here, are consistent with the provisions of 5(f).

B. Plaintiffs' Claim of a Breach of the Trust Established by [HRS § 10-3\(1\)](#) and Article XII, Sections 4, 5 and 6 of the Hawai'i Constitution is Barred by Collateral Estoppel.

Plaintiffs' claim that the specific OHA expenditures constitute a breach of trust under State law is barred by the related doctrine of collateral estoppel, or issue preclusion. As set out above, the district court in *Day v. Apoliona* declined to exercise pendent jurisdiction over the State law claim, so the district court did not decide specifically whether State law required OHA to use the public trust solely for the benefit of native Hawaiians. *Day*, 2008 U.S. Dist. LEXIS 48211, at *12, Although the court determined that pursuant to *federal* law, OHA could properly expend funds for any one of the purposes set out in the Admission Act. the court also analyzed each expenditure to hold the OHA trustees could reasonably have exercised their considerable judgment and discretion to determine that each expenditure bettered the conditions of native Hawaiians, These holdings estop Plaintiffs from asserting their State law claim here.

“Collateral estoppel is an aspect of res judicata which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim” when the litigation was between the same parties, [Ellis, 51 Haw. at 55, 451 P.2d at 822](#) (citations omitted), or when “raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue.” *Id.* at 55-56, 451 P.2d at 822 (citing, *inter alia*, [Bernhardt v. Bank of Am. Nat'l Trust & Savs. Ass'n. 122 P.2d 892 \(Cal. 1942\)](#)). Even where the *claim* is different, collateral estoppel may bar relitigation of a previously litigated *issue*. *See Ellis, 51 Haw. at 56, 451 P.2d at 822.*

In *Day v. Apoliona*, the district court and the Ninth Circuit held that the OHA trustees had reasonably exercised their discretion in making expenditures of trust funds that, for purposes of federal law, satisfied at least one of the [section 5\(f\)](#) purposes. The only distinction between the analysis for purposes of federal law and for purposes State law is that, by virtue of [HRS section 10-3](#), State law “appears to limit OHA's uses of § 5(0 trust proceeds to only one of the five purposes enumerated in the federal statute.” *Day*, 616 F.3d at 921-22 (citing [HRS §§ 10-3](#) and [10-13.5](#), noting that [§ 10-3](#) requires the portion of the § 5(f) trust's proceeds to “be held and used [by OHA] solely as a public trust for the betterment of the conditions of native Hawaiians”). Although [HRS section 10-3](#) refers to one specific 5(f) trust purpose, it established no additional restrictions or requirements on use of those funds. Consequently, aside from the difference in the specific purposes the OHA trustees may further under federal and State law, the nature and breadth of the discretion the Ninth Circuit held the OHA trustees to possess is the same for purposes of both federal and State law.

In its analysis, the Ninth Circuit held that “[g]enerally, a trustee's ‘power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties.’ ” *Day*, 616 F.3d at 926 (quoting *Restatement § 87* cmt. a). The court noted that [section 5\(f\)](#) “establishes broad ‘purposes’ and does not direct specific expenditures,” with the result that the OHA trustees have discretion, meaning that they are to use fiduciary judgment, to determine whether a particular use of trust funds serves a trust purpose. *Id.* (“Plaintiffs themselves have conceded that the trustees have broad discretion in determining what qualifies as use for a trust purpose.”). And, “[w]hen a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent **abuse** of discretion.” *Id.* (quoting *Restatement § 87*). In the context of the narrow federal inquiry into whether an expenditure is a use for a trust purpose, an **abuse** of discretion occurs when a trustee “has acted unreasonably-- that is, beyond the bounds of a reasonable judgment.” *Id.* (citing *Restatement § 87* cmt. c). The court therefore analyzed the expenditures “to determine whether any of them is beyond the bounds of a trustee's reasonable judgment that the project in question would serve § 5(0 trust purposes.”⁵ *Id.* at 926-27.

The Ninth Circuit's analysis is controlling as well. As detailed above, as to each expenditure, the court held that it was within the trustees' broad discretion to determine that the expenditure would better the conditions of native Hawaiians. thus satisfying at least one of the 5(f) trust purposes. Since the betterment of the conditions of native Hawaiians is the very trust purpose to which OHA trustees' expenditures of 5(f) funds are presumably restricted by State law, there can have been no breach of trust under that State law. Collateral estoppel thus bars the Plaintiffs' State law claim.

C. Even if Res Judicata and Collateral Estoppel Did Not Bar Plaintiffs' Claim, the Claims Fail for the Same Reasons the Claims Failed in Day v. Apoliona.

Even apart from the preclusive effect of the doctrines of res judicata and collateral estoppel. Plaintiffs' claims fail, independently, for the very same reasons the district court and the Ninth Circuit held dismissal of the claims to be appropriate in *Day v. Apoliona*. In other words, even if the judgment in that action did not bar the claim here, the claim would fail based upon the same authority and analysis on which those courts relied.

D. The OHA Trustees are Entitled to Qualified Immunity for the Same Reasons They Were Entitled to Such in Immunity in Day v. Apoliona.

Plaintiffs assert their claim, seeking damages and other relief, against the OHA trustees not only in their official capacities, but in their individual capacities. Plaintiffs have not, however, described any conduct by the OHA trustees outside their capacities as trustees and have not otherwise articulated a legal basis for claims against the trustees individually, or for damages.

Plaintiffs have not asserted a claim under [42 U.S.C. § 1983](#), which permits damages claims for deprivation of rights, secured by the United States Constitution, by an individual acting under color of state law, and such a claim was dismissed in *Day v. Apoliona*. Plaintiffs also do not purport to invoke any authority that would permit direct claims for damages against individuals for alleged deprivations of rights secured under the State law.

In any event, to the extent Plaintiffs attempt to assert a State claim that would parallel a [§ 1983](#) claim, the claim would fail based on the same qualified immunity analysis conducted by the district court in *Day v. Apoliona*. There, the district court noted that “[q]ualified immunity ... shields [§ 1983](#) defendants ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ ” 2008 U.S. Dist. LEXIS 48211, at *18 (citations omitted). The first step in a qualified immunity analysis is an examination of “whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the defendant's conduct violated a constitutional or statutory right.” *Id.* (citing *Kwai Fun Wong v. United States*, 373 F.3d 952, 961 (9th Cir. 2004)). The court noted that the initial part of the qualified immunity analysis was the same as a review of the substantive merits of the [§ 1983](#) claims: “If no constitutional or statutory right would have been violated by the alleged actions, the qualified immunity inquiry ends, and a defendant has qualified immunity.” *Id.* at *20. As set out above, the court determined that each of the expenditures at issue was a reasonable exercise of discretion under [section 5\(f\)](#) so, because the OHA trustees established that the plaintiffs could not prevail with respect to the [§ 1983](#) claims, the OHA trustees were “simultaneously and redundantly” entitled to qualified immunity with respect to those claims. *Id.*

The same analysis applies here. Even assuming, for purposes of argument, that a State-law counterpart to [§ 1983](#) existed, any claim based upon it would be defeated by qualified immunity. As established above, each of the expenditures at issue was not only held to have satisfied at least one 5(f) trust purpose, each was held reasonably to satisfy the trust purpose of the betterment of the condition of native Hawaiians. Because Plaintiffs cannot establish that the OHA trustees' conduct violated a clearly established constitutional or statutory right, they are “simultaneously and redundantly” entitled to qualified immunity with respect to that claim.

VI. CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the OHA trustees respectfully request that their motion be granted, and that the Court dismiss all the claims against them.

DATED: Honolulu, Hawai'i, AUG 25 2011.

<<signature>>

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Footnotes

- 1 Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4 (1959). The Admission Act, at section 5(f), incorporates the HHCA definition of "native Hawaiian," which is "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201. As used herein, in *Day v. Apoliona*, 616 F.3d 918 (9th Cir. 2010) and in the district court opinion it affirmed, "Hawaiian" includes any descendant of the indigenous peoples of the islands of Hawai'i, regardless of proportional ancestry. Cf. HRS § 10-2.
- 2 Article XII, section 4 of the [Hawaii Constitution](#) states:
The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to [Article XVI, Section 7 of the State Constitution](#), excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.
- 3 Despite this holding, Plaintiffs herein cite nothing to suggest that the legislation in its current form affects the definition of "native Hawaiian," either. See Native Hawaiian Government Reorganization Act of 2011, H.R. 1250, 112th Congress (2011).
- 4 Where the Hawaii Supreme Court has patterned a rule of procedure after an equivalent rule within the Federal Rules of Civil Procedure, "interpretations of the rule 'by the federal courts are deemed to be highly persuasive in the reasoning of [Hawai'i courts].'" *Kawamata Farms, Inc. v. United Agri Prods.*, 86 Hawai'i 214, 252, 948 P.2d 1055, 1093 (1997) (citation omitted).
- 5 The court held that under this standard, "although the trustees must reasonably act in pursuit of trust purposes and no others, they are not required to ensure that a given expenditure will provide only 'collateral benefits' to nonbeneficiaries or purposes not listed in the trust. *Day v. Apoliona*, 616 F.3d at 927 (citing *Price v. Akaka*, 3 F.3d at 1220, 1226 (9th Cir. 1993), granting OHA trustees qualified immunity where they "reasonably believed that [funding] a referendum to determine Hawaiian opinion" on whether to expand the definition of "native Hawaiian" was for the "betterment of the conditions of native Hawaiians" without any showing that native Hawaiians would benefit more than or differently from non-native Hawaiians).

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